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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of)	Petition No. R-11-0033
)	
PETITION TO AMEND RULE)	COMMENT OF THE PIMA COUNTY
3.8, ARIZONA RULES OF)	ATTORNEY
PROFESSIONAL CONDUCT)	
)	
)	
_____)	

BARBARA LAWALL, the Pima County Attorney, hereby opposes the proposed
change to Rule 3.8 of the Arizona Rules of Professional Conduct.

DATED this 21st day of May, 2012.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

_____/s/____

¶1 I oppose the petition to amend Rule 3.8 for the reasons stated in the Comment by the State Bar of Arizona and the Report to the State Bar Ethics Committee authored by the Criminal Practice & Procedure Committee Prosecution Section attached as Exhibit 2 to that Comment. The law and processes already in place, including prosecutors' existing duties, Rule 32, and DNA testing, adequately protect the innocent while also safeguarding legitimate convictions and conserving the finite resources available to prosecutors. The proposed change is ill-advised for several reasons.

¶2 First, the standards in the proposed change are amorphous. The new duty in the proposed change is triggered when a prosecutor "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." These words create an entirely new undefined and vague standard in Arizona. It is difficult to tell how far these terms will stretch. They are flexible to the point of vagueness. Unfortunately, the most likely way that prosecutors will learn the scope of this definition is in a State Bar disciplinary proceeding.

¶3 Second, the duty to investigate places a heavy burden on prosecutors. Under the proposed change, the only certainty is that a new duty is created. Where that duty begins, how it is to be executed, and how far it extends is totally unclear. In addition, this new duty to investigate places an unprecedented requirement on prosecutors'

offices. Investigations are conducted by law enforcement, over which the prosecutor has limited, if any, authority. At the same time, if prosecutors intervene and undertake investigative work, they lose their absolute immunity from civil liability. The proposed change assigns prosecutors a function that has traditionally been outside the prosecutor's role. It also raises a more fundamental question of whether any person will ever be satisfied that a prosecutor adequately investigated a claim that a defendant did not commit the crime of which he was convicted by that prosecutor.

¶4 Next, prosecutors already have the duty to disclose clearly exculpatory evidence after a conviction. That standard is reasonable, clearly articulated, and well-defined. In addition, Rule 32 provides a well-established avenue of relief when there is newly discovered evidence that “probably would have changed the verdict or sentence.” Ariz. R. Crim. P. 32.1(e). These existing rules already protect a defendant's rights while helping to avoid a deluge of spurious claims.

CONCLUSION:

¶5 In sum, our existing rules and procedures protect both the innocent and the public. The proposed change to Rule 3.8 is unnecessary and flawed. For these reasons, I urge you to reject the Petition to amend Rule 3.8.

RESPECTFULLY SUBMITTED this 21st day of May, 2012.

/s/
BARBARA LAWALL
PIMA COUNTY ATTORNEY

CERTIFICATE OF SERVICE

I certify that, on the 21st day of May, 2011, the original of the foregoing document was electronically filed in Word format and pdf format with:

Clerk of the Court
Arizona Supreme Court,
1501 West Washington St.
Phoenix, AZ 85007

/s/
BARBARA LAWALL
Pima County Attorney